**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>CITADEL COMMUNICATIONS CORPORATION<br><br>and<br><br>TRIATHLON BROADCASTING COMPANY<br><br>and<br><br>CAPSTAR BROADCASTING CORPORATION<br><br>Defendants. | Civil Action No. 99-CV-01043<br>(Judge Hogan)<br>4/30/99 |

## AMENDED COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Amended Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

## I. NATURE AND PURPOSE OF THE PROCEEDING

The plaintiff filed an amended civil antitrust Complaint on April 30, 1999 ("Complaint") alleging that Citadel Communication Corporation's ("Citadel") "Joint Sale Agreement" ("JSA") with Triathlon Broadcasting Company ("Triathlon") violates Section One of the Sherman Act,

15 U.S.C. § 1. The Complaint alleges that the JSA between Citadel and Triathlon is anticompetitive in the Colorado Springs, Colorado, and Spokane, Washington, radio advertising markets. The Complaint also alleges that Triathlon's acquisition of additional radio stations in Spokane is anticompetitive.

The Complaint alleges that in Colorado Springs, Citadel's KKFM-FM, and KKMG-FM competed against Triathlon's KSPZ-FM, KVUU-FM, KTWK-AM, and KVOR-AM prior to the JSA, and that since the creation of the JSA, Citadel has acquired KKLI-FM. The complaint further alleges that since Citadel and Triathlon instituted the JSA in Colorado Springs, Citadel now sets the prices for radio advertising for both its and Triathlon's stations. In addition, the complaint alleges that Citadel approached its remaining competitors in Colorado Springs and suggested that they could all make more money if they were to eliminate a discount to certain advertisers, thus indicating its intent and willingness to collude and avoid price competition.

The complaint alleges that in Spokane, Citadel's KAEP-FM, KDRK-FM, KJRB-AM, and KGA-AM competed against Triathlon's KKZX-FM, KEYF-FM, KEYF-AM, and KUDY-AM prior to the JSA. The complaint further alleges that since Citadel and Triathlon instituted the JSA in Spokane, Citadel now sets the prices for radio advertising for both its and these Triathlon stations. In addition, the complaint alleges that Triathlon later acquired KNFR-FM, KISC-FM, and KAQQ-AM in Spokane, and has a reduced incentive to compete against the JSA because it receives a share of the profits from the JSA.

Finally, the complaint alleges that Capstar Broadcasting Corporation ("Capstar") has announced its agreement to acquire Triathlon, including its stations in Colorado Springs and Spokane. After it acquires Triathlon, Capstar would become a party to the JSA, if the JSA were still in existence.

The prayer for relief seeks: (a) adjudication that Citadel's JSA with Triathlon in Colorado Springs violates Section One of the Sherman Act, 15 U.S.C. § 1; (b) adjudication that Citadel's JSA with Triathlon and Triathlon's acquisition of non-JSA stations in Spokane violate Section One of the Sherman Act, 15 U.S.C. § 1; (c) entry of an injunction terminating the JSA in both Colorado Springs and Spokane and requiring Capstar to divest KEYF-FM in Spokane; (d) entry of an injunction preventing Citadel from discussing the price of radio advertising time with competitors in Colorado Springs and Spokane; and (e) such other relief as is proper.

The United States has reached a proposed settlement with Citadel and Capstar which is memorialized in the proposed Final Judgment filed with the Court. Under the terms of the proposed Final Judgment, Citadel and Capstar will terminate the JSA and Capstar will divest KEYF-FM.

The plaintiff and defendants Citadel and Capstar have stipulated that the proposed Final Judgment may be entered after compliance with the APPA and that they can fulfill their obligations under the Final Judgment. Entry of the proposed Final Judgment would terminate

this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the Final Judgment and to punish violations thereof.

## II. THE ALLEGED VIOLATION

### A. The Defendants

Citadel is a Nevada corporation with its headquarters in Las Vegas, Nevada. According to industry estimates, it owns 107 radio stations in 20 U.S. markets. Triathlon is a Delaware Corporation with its headquarters in San Diego, California. According to industry estimates, it currently owns 31 radio stations in six U.S. markets. Capstar has announced its agreement to acquire Triathlon.

Capstar is a Delaware corporation with its headquarters in Austin, Texas. It is associated with Hicks, Muse, Tate, & Furst Incorporated ("Hicks-Muse"), a Delaware corporation with its headquarters in Irving, Texas. According to industry estimates, Capstar owns approximately 309 radio stations in 76 U.S. markets. Chancellor Media Company, a company with which Capstar shares some directors and owners, has announced its intention to acquire Capstar.

### B. Description of the Events Giving Rise to the Alleged Violation

Prior to December, 1995, the Citadel and Triathlon radio stations in Colorado Springs and Spokane competed against each other within their respective cities. On or about December 15, 1995, however, Citadel and Triathlon's predecessor corporation entered into a Joint Sales Agreement ("JSA"). Under the terms of the JSA, Citadel sets prices and sells advertising time on

the radio stations subject to the JSA in both Colorado Springs and Spokane. Citadel also collects payments from advertisers, makes a monthly report to Triathlon, deducts expenses, and divides the profits between the parties. Citadel and Triathlon have operated under the JSA since December, 1995. Later, Triathlon acquired another group of radio stations in Spokane.

### C. Anticompetitive Consequences of the JSA

#### 1. The Sale of Radio Advertising Time In Colorado Springs, Colorado, and Spokane, Washington, Are The Appropriate Markets in Which to Analyze This Antitrust Action.

The Complaint alleges that the provision of advertising time on radio stations serving Colorado Springs, Colorado, and Spokane, Washington, constitutes a line of commerce and sections of the country, or relevant markets, for antitrust purposes. Radio stations, by their programming, seek to attract listeners. The radio stations then sell advertising time to advertisers who want to reach those listeners. Radio's unique characteristics as an inexpensive drive-time and workplace news and entertainment companion has given it distinct and special qualities. Retailers, in an effort to reach potential customers, use a mix of electronic and print media to deliver their advertising messages. In so doing, they have learned that certain media are more cost-effective than others in meeting certain of their advertising goals and that radio can serve several such goals.

When radio advertisers use radio as part of a "media mix," they often view the other advertising media (such as television or newspapers) as a complement to, and not a substitute for, radio advertising. Many advertisers who use radio as part of a multi-media campaign do so because they believe that the radio component enhances the effectiveness of their overall advertising

campaign. They view radio as giving them unique and cost-effective access to certain audiences. They recognize that because radio is portable, people can listen to it anywhere -- especially in places and situations where other media are not present, such as in the office and car. In addition, they know that radio formats are designed to attract listeners in specific demographic groups. As a consequence of the foregoing factors, the closest substitute to advertising on one radio station, for many advertisers, is advertising on other radio stations.

In addition to accomplishing these goals more efficiently than other media, radio advertising is the relevant market in which to evaluate the JSA because a hypothetical monopolist of radio stations could profitably raise prices. Although some local and national advertisers may switch some of their advertising to other media rather than absorb a price increase in the cost of radio advertising time, the existence of such advertisers would not prevent all radio stations in the Colorado Springs and Spokane markets from profitably raising their prices a small but significant amount. At a minimum, stations could profitably raise prices to those advertisers who view radio as a necessary advertising medium for them, or as a necessary advertising complement to other media. Radio stations negotiate prices individually with advertisers; consequently, radio stations can charge different advertisers different prices. Radio stations generally can identify advertisers with strong radio preferences. Because of this ability to price discriminate among customers, radio stations may charge higher prices to advertisers that view radio as particularly effective for their needs, while maintaining lower prices for other advertisers.

### 2. Harm to Competition

**a. The concentration of radio stations in Colorado Springs and Spokane substantially harms competition**

The Complaint alleges that Citadel's JSA with Triathlon in Colorado Springs and Spokane along with Triathlon's subsequent acquisition of additional stations in Spokane harms competition. Prior to the JSA, an advertiser buying radio advertising time could select a combination of Citadel, Triathlon, and independent stations that would allow it to exclude either the Triathlon or Citadel stations -- thus giving both Citadel and Triathlon an incentive to negotiate with the advertiser. After the JSA, however, the Citadel and Triathlon stations subject to the JSA no longer compete with each other. Because the JSA represents a large percentage of the radio advertising available in those geographic markets, many advertisers in those markets cannot meet their listener goals without using the JSA stations. Realizing that these advertisers cannot buy around its JSA, Citadel can raise prices to many advertisers.

**b. Advertisers could not turn to other Colorado Springs or Spokane radio stations to prevent Citadel from imposing an anticompetitive price increase**

If Citadel and Triathlon raised prices to advertisers in Colorado Springs or Spokane, other radio stations in Colorado Springs and Spokane would not and could not profitably offer additional advertising inventory or change their formats to provide access to different audiences, thus mitigating the effect of the price increase. Stations are constrained in their ability to play additional commercials by the tendency of listeners to avoid stations that play too much advertising and the insistence of advertisers on "separation" from similar advertisers. Thus, even if advertisers trying to avoid a price increase wanted to run additional commercials on non-Citadel and non-Triathlon

stations, the alternative stations would likely be unable to accommodate them. Moreover, even assuming that such a station could accommodate an increase in advertisers, it would perceive the increase in demand for its product and would have an incentive to raise its prices as well. Finally, successful stations are reluctant to change formats because of the risk and costs involved in a format change and unsuccessful stations may not be able to gain a large enough audience to undermine a supra-competitive price increase. In addition, an advertiser wishing to reach a broad audience cannot simply run more commercials on fewer stations, because the advertiser will not reach a broad enough audience without a range of stations.

In both the Colorado Springs and Spokane radio advertising markets, new entry is unlikely as a response to a supra-competitive price increase from the JSA. In addition, it is unlikely that stations in adjacent communities could boost their power so as to enter the Colorado Springs or Spokane markets without interfering with other stations and thus violating Federal Communications Commission regulations.

## III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition in the sale of radio advertising time in both Colorado Springs and Spokane. It requires Citadel and Capstar[1] to terminate their JSA

[1] Although this action names Triathlon as a defendant, the Department expects that Triathlon will be acquired by Capstar soon and will then cease to have a separate legal existence. Hence, relief against it is unnecessary. When Triathlon's separate existence is terminated, the Department will move to dismiss it as a defendant. This will occur before the Department moves for entry of the proposed Final Judgment at the conclusion of the Tunney Act review process.

as soon as possible, but no later than June 2, 1999. Plaintiff, at its sole discretion, may extend the time period for the parties to comply with the terms of the Final Judgment for two additional 30-day periods. In addition, the proposed Final Judgment requires Capstar to divest KEYF-FM in Spokane. Defendants have also expressed their desire to exchange certain other stations among themselves and plaintiff has stipulated that it will not contest any or all of their proposed exchanges. See Stipulation and Order, ¶¶ 4 & 5. The Final Judgment provides that neither defendant, nor their successors, can acquire any other radio station in either Colorado Springs or Spokane without giving the Antitrust Division of the Department of Justice prior notice. Furthermore, the Final Judgment places conditions on the parties if they wish to enter any subsequent JSA in either Colorado Springs or Spokane. Capstar (never a party to the JSA) may not enter into a JSA in those cities without notifying the Antitrust Division; Citadel may not enter a JSA in those cities without permission from the Antitrust Division. Despite their clear competitive significance, JSAs may not all be reportable to the Department under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act"). Thus, this provision in the proposed Final Judgment ensures that the Department will receive notice of and be able to act, if appropriate, to stop any agreements that might have anticompetitive effects in these radio advertising markets. Finally, the proposed Final Judgment prevents Citadel from discussing radio advertising prices and discounts with other radio stations in both Colorado Springs and Spokane. Nothing in this proposed Final Judgment limits the plaintiff's ability to investigate or bring actions, where appropriate, challenging other past or future activities of defendants in Colorado Springs, Spokane, or any other markets, including their entry into a JSA or any other agreements related to the sale of advertising time except those specifically identified in the Complaint.

## IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action.

## V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The plaintiff and the defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to its entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Any such written comments should be submitted to:

Craig W. Conrath
Chief, Merger Task Force
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 4000
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

## VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The plaintiff considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its complaint against defendants. The plaintiff is satisfied, however, that the termination of the JSA and other relief contained in the proposed Final Judgment will preserve viable competition in the sale of radio advertising time in the Colorado Springs and Spokane radio advertising markets. Thus, the proposed Final Judgment achieves all of the relief the Government would have obtained through litigation, but avoids the time, expense and uncertainty of a full trial on the merits of the complaint.

## VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether

entry of the proposed Final Judgment "is in the public interest." In making that determination, the court may consider --

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). As the United States Court of Appeals for the District of Columbia Circuit recently held, this statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See United States v. Microsoft Corp., 56 F.3d 1448, 1461-62 (D.C. Cir. 1995). In conducting this inquiry, "[t]he Court is nowhere compelled to go to trial or to

engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[2] Rather,

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988) (citing United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.)); see also Microsoft, 56 F.3d at 1460-62. Rather,

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the

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[2] 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), reprinted in U.S.C.C.A.N. 6535, 6538.

public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[3]

The proposed Final Judgment, therefore, need not be certain to eliminate every anticompetitive effect of a particular practice. Court approval of a final judgment requires a more flexible and less strict standard than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' "[4]

In this case, the proposed Final Judgment meets the appropriate standard**.** The Final Judgment dissolves the JSA. In addition, Capstar's divestiture of KEYF-FM in Spokane will cure the anticompetitive effects of Triathlon's prior acquisitions there. The exchanges of stations anticipated by defendants Citadel and Capstar leave both surviving parties with radio advertising market shares of approximately 40% or less in both Colorado Springs and Spokane.

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[3] Bechtel, 648 F.2d at 666 (citations omitted)(emphasis added); see BNS, 858 F.2d at 463; United States v. National Broad. Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); Gillette, 406 F. Supp. at 716. See also Microsoft, 56 F.3d at 1461 (whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' ") (citations omitted).

[4] United States v. American Tel. and Tel Co., 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd. sub nom. Maryland v. United States, 460 U.S. 1001 (1983) ( quoting Gillette Co., 406 F. Supp. at 716 (citations omitted)); United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).Washington, D.C. 20530

## VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Respectfully submitted,

_____/s/_____

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